

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF EAST LANSING,

Plaintiff-Appellant,

v

MEREK LEO ROMAN,

Defendant-Appellee.

UNPUBLISHED

October 7, 2010

No. 291951

Ingham Circuit Court

LC No. 08-001111-AR

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by leave from the circuit court's dismissal of defendant's conviction. We reverse the circuit court and remand for consideration of the issues raised but not decided below.

Defendant's conviction arose from the 2008 Cedar Fest disturbance in East Lansing. Police officers videotaped the disturbance, and the resulting videotape included images of defendant at the front of a crowd in which some people were throwing objects and shouting obscenities at police. Although the videotape did not depict defendant throwing objects, the videotape does show defendant gesturing and cursing at police.

Shortly after the disturbance, defendant was charged with disorderly conduct-assembling for a riot in violation of the East Lansing City Code, Art II, div 2 § 26-52(10) (2008). After a jury trial, the district court convicted defendant of violating the ordinance. The district court sentenced defendant to 10 days in jail, 24 months probation, 40 hours of community service, and a year-long ban on entering the campus of any Michigan public college or university. Defendant appealed to the circuit court, which dismissed defendant's conviction on the ground that § 26-52(10) was unconstitutionally vague as applied to defendant.

On appeal to this Court, plaintiff contends the circuit court erred in holding the ordinance unconstitutional. The constitutional issue presents a question of law, which we review de novo. *People v Barton*, 253 Mich App 601, 603; 659 NW2d 654 (2002). We evaluate the constitutionality of an ordinance under the same rules as those applicable to statutes. *Id.* We apply a presumption that the ordinance at issue is constitutional. *Id.*

At the time of defendant's crime, the ordinance at issue read:

No person shall

* * *

Assemble or act in concert with four or more other persons for the purpose of engaging in conduct constituting the crime of riot, or be present at any assembly that either has or develops such a purpose and remain thereat with intent to advance such purpose. [§ 26-52(10).]

We first observe that although the circuit court's order specifically states the ordinance "is unconstitutionally vague as applied to Defendant," the order also states "the Ordinance is void for vagueness." To the extent the circuit court found the ordinance to be unconstitutionally vague on its face, the court erred. The ordinance is materially indistinguishable from the unlawful assembly statute this Court upheld *People v Garcia*, 31 Mich App 447, 456-457; 187 NW2d 711 (1971) (upholding MCL 752.543). Under *Garcia*, the ordinance is not unconstitutionally vague on its face.

The remaining issue is whether the ordinance is unconstitutionally vague as applied. The constitutional due process guarantee precludes vagueness in criminal statutes: each statute must clearly define the conduct it proscribes. US Const, Am XIV; Const 1963, art 1, § 17; *People v Gagnon*, 129 Mich App 678, 683; 341 NW2d 867 (1983), citing *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). This Court has explained:

A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; (3) its coverage is overbroad and impinges on First Amendment freedoms. [*People v Nichols*, 262 Mich App 408, 409-410; 686 NW2d 502 (2004) (internal citations and quotations omitted).]

Here, the circuit court applied the first ground and found that the ordinance failed to provide fair notice of the proscribed conduct.¹ We disagree. The ordinance plainly precluded defendant from remaining at a riot with intent to advance the riot. We find nothing vague in the concept or definition of the term "riot." The term is defined clearly in MCL 752.541. Accord, *People v Kim*, 245 Mich App 609, 617-619; 630 NW2d 627 (2001).

Defendant argues that the ordinance did not provide him with notice of the criminality of his particular conduct at the riot. In support, defendant focuses on the brevity of his curses and gestures and contends that the ordinance does not indicate whether these curses and gestures were criminal. Defendant's focus is misplaced. The ordinance precludes an individual from

¹ The circuit court also stated that the ordinance "impinges on First Amendment Freedoms." Defendant acknowledges that this statement was not the basis of the court's order. Accordingly, we need not address the First Amendment arguments.

remaining at a riot, whether for five seconds or five hours, if the individual has the intent to advance the “crime of riot.” § 26-52(10). Factual disputes may arise as to whether the individual had the requisite intent, but factual disputes do not render the underlying ordinance vague as applied. Rather, it is the intent element of the ordinance that differentiates this ordinance from the one this Court found unconstitutional as applied in *Barton*, 253 Mich App 601.

The *Barton* defendant uttered a racial slur in a restaurant and was convicted under an ordinance that prohibited engaging in “insulting” conduct in a public place. *Id.* at 602. The Court reasoned that the ordinance failed to “give adequate forewarning” that the conduct was criminal. *Id.* at 607. The Court further stated that the defendant could not reasonably have known the conduct was criminal. *Id.* Here, in contrast, the East Lansing ordinance provided notice of the specific prohibition against remaining at a riot: an individual who remains at a riot violates the ordinance if the individual has the intent to advance the riot.

Reversed and remanded for consideration of the additional issues raised by defendant below but not addressed by the circuit court. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey